IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BRIONY PATTERSON,	)	
Plaintiff,	)	
v.	)	CASE NO. 02 C 2549
THE UNIVERSITY OF CHICAGO,	)	JUDGE NORGLE
	)	MAGISTRATE JUDGE ASHMAN
Defendant.	)	

NOTICE OF MOTION

DOCKETED
OCT 27 2003

To: Edward A. Voci, Esq.
1111 South Boulevard
Oak Park, Illinois 60302

PLEASE TAKE NOTICE that at 9:30 a.m. on the 24th day of October, 2003, I shall appear before the Honorable Judge Norgle, or anyone sitting in his place and stead, in the Northern District of Illinois, Eastern Division, and present **Defendant's Third Motion to Dismiss for Want of Prosecution.**

Respectfully submitted,

THE UNIVERSITY OF CHICAGO

BY: ______________________
One of the defendant's attorneys

Daniel A. Kaufman – I.D. #06194714
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THE UNIVERSITY OF CHICAGO,	)	JUDGE NORGLE
Defendant.	)	MAGISTRATE JUDGE ASHMAN

DEFENDANT'S THIRD MOTION TO DISMISS FOR WANT OF PROSECUTION

Defendant, the University of Chicago ("the University"), by and through its attorneys, Daniel A. Kaufman and Laura Shroyer Liss of Michael Best & Friedrich LLC, moves this Court to dismiss this case for want of prosecution pursuant to Federal Rule of Civil Procedure 41(b) and Local Rule 41.1 for plaintiff's failure to comply with this Court's Order dated September 30, 2003 that required her to provide full and complete answers to all outstanding discovery by October 14, 2003 and to appear for her deposition by October 16, 2003.

Introduction

The University has attempted tenaciously to keep this case, which was filed over 18 months ago, on schedule. On April 1, 2003, the University filed a motion to dismiss for want of prosecution or, in the alternative, to compel plaintiff's initial disclosures and discovery responses. On May 14, 2003, the University renewed its motion to compel plaintiff's initial disclosures and discovery responses. On June 19, 2003, this Court ordered plaintiff to comply with any outstanding discovery requests by July 2nd and to be deposed by July 31, 2003. Plaintiff disregarded this Order.

On August 27, 2003, the University filed a renewed motion to dismiss for want of prosecution or, in the alternative, to compel plaintiff's initial disclosures, discovery responses and

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deposition. At the Court's direction in open court on August 29, 2003, the parties proposed, and the Court entered, an amended schedule, which, among other things, required plaintiff to comply with any outstanding discovery requests by September 8th and to be deposed by September 17, 2003. Plaintiff disregarded this Order.

When plaintiff failed to appear for the September 30, 2003 status hearing, this Court admonished plaintiff and ordered her to comply with all outstanding discovery by October 14, 2003 and to be deposed by October 16, 2003. Once again, plaintiff disregarded this Court's Order. A copy of the docket entries for this case, which include each of the aforementioned orders, is attached hereto as Exhibit A.

Despite the Court's prior Orders and the September 30, 2003 Order, plaintiff still refuses to supplement her initial disclosures and discovery responses, and to provide a medical release, the documents identified during the first session of her deposition, and a written designation of the documents produced to the University, including identification of the Request(s) to Produce to which the documents are responsive. Based on plaintiff's continued refusal to comply with this Court's Orders, this Court should dismiss this case for want of prosecution, order plaintiff to show cause why she should not be held in contempt, and should award the University the fees and costs associated with this motion, as well as its three prior motions to dismiss for want of prosecution and/or to compel plaintiff's compliance with her discovery obligations.

Background and History of Discovery

1. On April 9, 2002, plaintiff, a former graduate student at the University of Chicago, filed a complaint alleging that she was intentionally discriminated against in violation of §504 of the Rehabilitation Act, 29 U.S.C. § 794.

2. On July 24, 2002, this Court dismissed plaintiff's complaint with prejudice pursuant to Local Rule 41.1 for plaintiff's failure to serve the University within the allotted 120 days and for plaintiff's failure to appear for a status hearing.

3. On August 6, 2002, plaintiff filed a Motion to Vacate the Dismissal with Prejudice, which was granted.

4. Plaintiff ultimately served the University in August 2002, and the University filed a Partial Motion to Dismiss, as well as an Answer on behalf of the University on September 19, 2002.

5. On October 3, 2002, this Court set the following briefing schedule: plaintiff's response to the University's Partial Motion to Dismiss was due on or before October 25, 2002; and the University's reply brief was due on November 8, 2002.

6. Plaintiff failed to file a response to the University's Partial Motion to Dismiss on October 25, 2002, or at any time thereafter.

7. On December 4, 2002, this Court granted the University's Partial Motion to Dismiss and set the following schedule: discovery to close on June 30, 2003; final pretrial order due July 31, 2003; and jury trial to commence on August 26, 2003.

8. On January 14, 2003, the University served plaintiff with its Initial Disclosures, pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure, and requested that plaintiff provide the University with her Initial Disclosures by January 17, 2003.

9. On April 1, 2003, after multiple unsuccessful attempts pursuant to Local Rule 37.2 to obtain: a) plaintiff's initial disclosures in January, February and March 2003; and b) plaintiff's responses to the University's First Set of Interrogatories and First Request for Production of Documents in March 2003, the University filed a Motion to Dismiss for Want of Prosecution or, in the Alternative, to Compel Plaintiff's Initial Disclosures and Discovery Responses.

10. On April 4, 2003, this Court indicated in open court that the University's Motion was well-founded and admonished plaintiff's counsel to move this case along. A colleague of plaintiff's counsel, who appeared in Court that morning, tendered plaintiff's Initial Disclosures and responses to the University's Interrogatories and Document Requests.

11. On April 28, 2003, after three additional LR 37.2 letters by the University, the parties engaged in a discovery conference that concluded with plaintiff's counsel's agreement to supplement plaintiff's Initial Disclosures and discovery responses, to return plaintiff's fully executed IRS and medical releases, and to provide any changes to the University's proposed Stipulated Protective Order by April 30, 2003.

12. On May 14, 2003, following additional LR 37.2 efforts, the University resorted to filing a Renewed Motion to Compel when it: a) still did not receive plaintiff's supplemental Initial Disclosures and discovery responses, nor her IRS and medical releases; and b) was forced to cancel plaintiff's deposition for the third time due to plaintiff's non-compliance with discovery.[1]

13. On May 16, 2003, this Court took the University's Renewed Motion to Compel under advisement and set the case for status on June 19, 2003 to ensure the parties were progressing with discovery. This Court also allowed the parties to submit an Agreed Order, which would adjust the discovery, dispositive motion, pretrial and trial dates in light of plaintiff's non-compliance with discovery.

14. On May 27, 2003, this Court entered the parties' proposed dates as follows:

Discovery
Reports from retained experts under Rule 26(a)(2) due:
from plaintiff by July 7, 2003; and
from defendant by August 6, 2003.
Plaintiff shall make her expert available for deposition on or before July 23, 2003.
Defendant shall make its expert available for deposition or before August 22, 2003.

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1 The University noticed (and re-noticed) plaintiff's deposition for: April 1; May 1; and May 20, 2003.

All fact discovery to be completed by September 15, 2003.

Dispositive Motions
All potentially dispositive motions to be filed by October 15, 2003.
Briefs in response to dispositive motions to be filed by November 14, 2003.
Reply briefs in further support of dispositive motions to be filed by December 4, 2003.

In addition, this Court sua sponte included the following final pretrial order and trial dates:

Plaintiff to prepare proposed draft final pretrial order by October 2, 2003; parties to file joint final pretrial order by October 9, 2003.

This matter is set for trial on October 16, 2003 at 10:00 a.m.

(Attached as Exhibit B).

15. At the status hearing on June 19, 2003, after learning of the University's continued struggle to garner plaintiff's cooperation with discovery, this Court ordered plaintiff to comply with outstanding discovery requests by July 2, 2003 and to appear for her deposition on or before July 31, 2003.

16. Also on that day, the University sent plaintiff's counsel a letter offering three possible dates in July for plaintiff's deposition and specifically detailing the portions of plaintiff's initial disclosures[2] and discovery responses that needed to be supplemented. (Attached as Exhibit C).

17. On July 18, 2003, after plaintiff's counsel had failed to respond to the University's proposed dates for plaintiff's deposition in July and plaintiff had failed to supplement her initial disclosures and discovery responses, the University sent correspondence and a (fourth) re-notice of plaintiff's deposition for August 12, 2003. (Attached as Exhibit D). The University believed this date would allow time for plaintiff to comply with written discovery and to conduct plaintiff's deposition well in advance of the discovery cut-off.

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2 Plaintiff's counsel tendered Supplemental Initial Disclosures to the University's counsel following court on June 19, 2003, but those supplements still were deficient. To date, plaintiff has failed to provide a computation of her damages, including loss of income, emotional distress and medical costs, along with the documents and evidentiary material on which such computations are based.

18. On July 30 and August 4, 2003, the University sent additional letters to plaintiff's counsel pursuant to LR 37.2, but to no avail. (Attached hereto as Exhibits E & F).

19. On August 12, 2003, the University proceeded with plaintiff's deposition, but necessarily had to limit the deposition both in terms of scope and duration due to plaintiff's continued non-compliance with her discovery obligations. At the conclusion of the deposition, the parties agreed to resume plaintiff's deposition either on August 20 or 22, 2003. In addition, plaintiff referenced numerous documents during the deposition, which her counsel agreed to produce to the University by the week's end.

20. On August 18, 2003, having received no documentation from plaintiff nor confirmation for the continuation of plaintiff's deposition, the University sent a letter pursuant to LR 37.2, which memorialized the various documents that arose during the deposition and proposed August 26, 27 or 28, 2003 to resume plaintiff's deposition. (Attached as Exhibit G).

21. On August 20, 2003, the University sent to plaintiff's counsel another LR 37.2 letter. (Attached as Exhibit H).

22. Having received no documents and no response from plaintiff's counsel, the University left voice mail messages for him on August 21 and 25, 2003. In the voice mail message on August 25, 2003, the University's counsel indicated that it would be forced to re-new its Motion to Compel if plaintiff continued to fail to comply with her discovery obligations.

23. Having received no return letters or phone calls, on August 27, 2003, the University filed a Renewed Motion to Dismiss for Want of Prosecution or, In the Alternative, (Second Renewed) Motion to Compel Plaintiff's Initial Disclosures, Discovery Responses and Deposition.

24. On August 29, 2003, when the parties appeared on the University's motion, this Court directed the parties to confer privately and to notify the Court of any agreements reached. The parties agreed to the following schedule, which this Court approved in open court:

- Plaintiff to supplement her initial disclosures and discovery responses, and to provide the University with documents identified during the first session of her deposition by September 8, 2003;
- Plaintiff to sit for deposition by September 17, 2003;
- Plaintiff to disclose her expert by September 17, 2003;
- Status hearing on September 30, 2003;
- Defendant to disclose its expert by October 1, 2003;
- Discovery to close October 31, 2003; and
- Dispositive motions due December 5, 2003.

25. On September 3, 2003, the University sent a (fifth) re-notice for plaintiff's deposition on September 16, 2003.

26. On September 10, 2003, having received no documents, no discovery supplements, nor any communication whatsoever from plaintiff or her counsel, the University sent a letter pursuant to LR 37.2 reiterating its need for such documentation prior to plaintiff's deposition and moving plaintiff's deposition back one day, to September 17, 2003, to allow the University additional time to review said documents and information. (Attached as Exhibit I).

27. On September 12, 2003, having received no response from plaintiff's counsel, the University sent another letter pursuant to LR 37.2 urging plaintiff's counsel to respond. (Attached as Exhibit J).

28. On September 15, 2003, plaintiff's counsel left defense counsel a voice mail message indicating that he would deliver documents during the morning of September 16, 2003.

29. On September 16, 2003, the University received no documents from plaintiff but a voice mail message from her counsel indicating that the parties should select a new date for plaintiff's deposition.

30. On September 17, 2003, the University received (488) documents from plaintiff's counsel and a letter indicating that a portion of the documents "are physically in order, but numerically out of order." The letter lacked any explanation as to the documents produced.

31. Later that afternoon, the University sent plaintiff's counsel a letter pursuant to LR 37.2 requesting that plaintiff comply with this Court's order to provide the documents identified during the first session of plaintiff's deposition and supplements to her initial disclosures and discovery responses, and to include a written designation for the documents produced that day, including identification of the Request(s) to Produce to which the documents are responsive. The University included a (sixth) re-notice of plaintiff's deposition for September 25, 2003. (Attached as Exhibit K).

32. Late that evening, plaintiff's counsel responded by e-mail indicating that he was "preparing additional responses" and would be better able to inform the University of when those responses would be submitted upon his return to the office on September 22, 2003. Plaintiff's counsel further indicated that he was unable to proceed with plaintiff's deposition on September 25, 2003, but did not propose any alternative dates for the deposition. (Attached as Exhibit L).

33. On September 23, 2003, having received no communication from plaintiff's counsel, the University sent another LR 37.2 letter and a (seventh) re-notice for plaintiff's deposition on October 2, 2003. (Attached as Exhibit M).

34. On September 30, 2003, plaintiff's counsel failed to appear for the status hearing. In open court, this Court: indicated that the University had made a compelling argument to dismiss the case for want of prosecution; ordered plaintiff to comply with all outstanding discovery by October 14, 2003 and to appear for her deposition by October 16, 2003; and admonished plaintiff that if she fails to comply with these obligations, the Court seriously would consider dismissing the

case for want of prosecution and imposing sanctions. In light of plaintiff's non-compliance, this Court also vacated the date by which the University is to make its expert disclosure.

35. On October 6, 2003, having heard nothing from plaintiff, the University sent an (eighth) re-notice of plaintiff's deposition for October 16, 2003 and a LR 37.2 letter requesting that, by the close of business on October 9, 2003, plaintiff provide: supplemental Initial Disclosures and discovery responses; the various documents identified during the first session of her deposition; a written designation of the documents produced by plaintiff on September 17th, including identification of the Request(s) to Produce to which the documents are responsive; and a fully executed Medical Release to be issued to Barnes & Noble. (Attached as Exhibit N).

36. On October 14, 2003, plaintiff's counsel left a voice mail message for defense counsel indicating that he was "going to try real hard to get most of" the items owed to the University to defense counsel that day. However, no documents or discovery supplements were received.

37. On October 15, 2003, counsel for the parties spoke and plaintiff's counsel indicated that he would provide the University with (150-200) documents on October 16, 2003 and plaintiff's supplemental initial disclosures and discovery responses by October 17, 2003. Accordingly, the University was unable to proceed with plaintiff's deposition on October 16th, and the parties agreed to proceed with her deposition on October 24, 2003.

38. Later that day, the University sent plaintiff's counsel a letter confirming their agreement and a (ninth) re-notice for plaintiff's deposition on October 24, 2003. (Attached as Exhibit O).

39. On October 16, 2003, plaintiff's counsel left a voice mail message indicating that the Bates numbering of the documents had gotten confused and that he would deliver the documents the following morning.

40. On October 17, 2003, the University received a package containing a letter and approximately 165 documents. The letter lacked any explanation as to the documents produced. The letter further lacked any mention of the missing medical release and supplemental initial disclosures and discovery responses. The letter further lacked any mention of when the University could expect to receive same. (Attached as Exhibit P).

41. As of the filing of this motion on October 22, 2003, the University has heard nothing further from plaintiff's counsel and has received no additional information or documentation.

42. After a thorough LR 37.2 process, and despite this Court's Orders and the University's diligent efforts to resume plaintiff's deposition and to obtain her compliance with discovery, plaintiff still has not fully responded to discovery, provided complete Initial Disclosures, or appeared to resume her deposition.

43. A case may be dismissed pursuant to Federal Rule of Civil Procedure 41(b) "when there is a clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailing." *Maynard v. Nygren*, 332 F.3d 462, 467 (7th Cir. 2003) (*quoting Williams v. Chicago Bd. of Educ.*, 155 F.3d 853, 857 (7th Cir. 1998)).

44. A party that fails to comply with a court order can both be held in contempt of court and sanctioned. *See, e.g., Illinois Tool Works, Inc. v. Metro Mark Products, Ltd.*, 43 F. Supp. 2d 951, 964-65 (N.D. Ill. 1999) (ordering attorney's fees as a sanction for failing to comply with a discovery order and noting that the conduct at issue was also likely contemptuous); *Johnson v.*

Kakvand, 192 F.3d 656 (7th Cir. 1999) (ordering attorneys' fees as a sanction for failing to comply with discovery order).

45. Since filing this lawsuit over 18 months ago, plaintiff has failed to engage meaningfully in discovery or to exhibit any apparent interest in this litigation. But for the University's persistence through numerous voice mails, correspondence and motions filed pursuant to Rules 37 and 41(b), plaintiff's case likely would have remained dormant.

46. The University has done more than its part to proceed in this case. Despite its diligent efforts, it has been unable to achieve plaintiff's compliance with her discovery obligations. Plaintiff repeatedly has thwarted the University's diligent attempts to complete the necessary discovery in this case.

47. For these reasons, the University requests that this Court enter a rule for plaintiff to show cause why she should not be held in contempt for her failure to comply with this Court's September 30, 2003 Order and her case dismissed for want of prosecution.

48. Counsel for the University have fully complied with their obligation pursuant to Local Rule 37.2, to engage in personal consultation with opposing counsel and have made numerous good faith attempts to resolve these discovery disputes prior to the filing of this motion. However, efforts at resolving these disputes continue to be unsuccessful.

Conclusion

Over 18 months have passed since this case was commenced and over eight months have passed since the University served its first set of interrogatories and first set of document requests upon plaintiff. Although plaintiff was the one who initiated this lawsuit, she has failed to provide complete initial disclosures and to comply otherwise with her discovery obligations, thereby failing to provide facts and produce documents that support her claims against the University. Moreover, plaintiff *refuses* to produce such information despite this Court's Order and prior Orders. Plaintiff's violations of this Court's Orders, including its most recent Order of September 30, 2003, warrant the dismissal of this case and the award of fees and costs to the University.

WHEREFORE, the University respectfully requests that this Court dismiss this case for want of prosecution, enter a rule for plaintiff to show cause why she should not be held in contempt for her failure to comply with this Court's September 30, 2003 Order and prior Orders; and award the University the fees and costs associated with this motion, as well as its three prior motions to dismiss for want of prosecution and/or to compel, and for such other further relief that this Court deems just.

Dated: October 22, 2003

Respectfully submitted,

THE UNIVERSITY OF CHICAGO

By: ______________________
One of its attorneys

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See Case File For Exhibits